No. 17398

In the

United States Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

JOYCE A. HARRINGTON,

Appellee.

Reply Brief for Appellant

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SUBJECT INDEX

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The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington, the insured, loaded a German Mauser automatic pistol with ten rounds of ammunition, placed the gun to his head and pulled the trigger. The question to be decided is whether the death of Mr. Harrington was accidental. Over the repeated objections of appellant, appellee was permitted to introduce a series of hearsay declarations intended to show that the insured relied upon the safety mechanism of the gun and that the discharge of the gun was, therefore, unintended. These statements were inadmissible and their admission was error. Moreover, under all of the evidence, admissible and otherwise, defendant was entitled to judgment as a matter of law. For it is apparent that whatever his hope or expectation concerning

the condition of the gun Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence. In these circumstances, it is settled that death was not accidental and that appellant was and is entitled to judgment.

ARGUMENT

1. The Findings, the Conclusions and the Judgment Are Based Upon Inadmissible Evidence.

Over appellant's earnest and repeated objections, the District Court permitted the following evidence to go into the record:

(i) The testimony of appellee that prior to firing the fatal shot, the insured told her not to worry because the safety of the Mauser was on safe and that he would "prove" it to her (R. 95, 115-116); and that he tried to show her that the safety was on safe (R. 94);

(ii) The testimony of appellee that immediately after his injury, the insured looked at her with "great surprise" upon his face, and threw up his hands as he fell (R. 118); and

(iii) The testimony of Police Officer James F. Swinfard that upon his arrival at the scene and in response to his question as to what had happened, appellee told him that her husband had shot himself, but that he didn't mean it (R. 131, 135).

All of this evidence was plainly hearsay and much of it consisted solely of the opinions and conclusions of appellee. The evidence was inadmissible and its admission was error.*

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*Appellee suggests that under Rule 43 (a) of the Federal Rules of Civil Procedure, doubtful evidence questions should be resolved in favor of admissibility (p. 15). The decisions cited to support this proposition do not so hold, nor, so far as appellant is able to determine, was the point considered in them.

First: It was error to admit into evidence the alleged statements of the insured prior to his injury to the effect that the safety of the gun was set on safe.

Appellant does not question the rule of *Whitlow v. Durst,* 20 C.2d 523, 127 P.2d 530 (1942), upon which appellee relies (p. 16), that when the intent of a declarant is a material element of a disputed fact, declarations indicating that intent may be admissible as exceptions to the hearsay rule. What matters here, however, is the qualification of that rule—that such declarations are admissible only where there is evidence that they are probably trustworthy and credible, and that they were made at a time when there was no motive to deceive. *People v. Hamilton,* 55 C.2d 881, 895, 362 P.2d 473 *Modified,* 56 A.C. 94, ... P.2d ..... (1961). Appellee argues that, upon a review of what took place upon the evening of the fatal shooting, the circumstances are "drained of suspicion" of suicide (p. 17). But appellee ignores the fact that sometime during that evening Mr. Harrington, whose invariable practice it was to keep his guns unloaded in the home (Ex. 6, p. 3) loaded the Mauser automatic with ten rounds of live ammunition. This evidence alone almost compels the conclusion that he was at least considering suicide as a relief for his frustations. Why else would he have loaded the gun? It cannot, therefore, be said that plaintiff has established that the declarations which were made were probably trustworthy or that they were made at a time when there was no motive to deceive. Under the rule of *People v. Hamilton,* the admission of this evidence was error.

Second: It was error to admit the testimony of appellee that immediately after his injury the insured allegedly looked at her with "great surprise" upon his face.

It is settled that opinion evidence is admissible only when there is some basis in the experience of the witness for

forming the opinion stated. See *People v. McLean,* 56 A.C. 683, ... P.2d ..... (1961); 32 C.J.S., Evidence, § 455, p. 94. That this is so seems to be conceded by appellee for she says that opinion evidence is admissible "if the subject is one on which the ordinary person has some knowledge and experience . . . . " (p. 18). Did appellee have any basis in experience for forming the opinion that the insured's expression was one of surprise? Mr. Harrington was in a state of extreme physical and emotional shock. A bullet had just passed through his brain. Neither appellee nor any witness could have known to what extent the trauma of the wound was responsible for his expression. How could the effect of the wound have been taken into account at all? It seems apparent that there could have been no basis in appellee's experience for the opinion expressed. Its admission was therefore error. Compare *People v. McLean,* 56 A.C. 683, ... P.2d ..... (1961).

Third: It was error for the District Court to admit into evidence the testimony of Officer Swinfard that upon his arrival on the scene, Mrs. Harrington told him that her husband had just shot himself but that he did not mean it.

This evidence was hearsay and was far too remote to come within the spontaneous declaration exception to the hearsay rule.* Moreover, there can be no doubt that the evidence also constituted an inadmissible opinion and conclu-

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*The authorities to the point are discussed in appellant's opening brief (pp. 16-17). It only remains here to comment upon one statement of fact made by appellee. Appellee says "it may reasonably be inferred from the evidence that this assertion was made within six minutes from the time Mrs. Harrington had seen her husband drop to the floor. . . ." (p. 19). In fact Mrs. Harrington testified that after the insured's injury she first gathered the children together and sent them into the bedroom (R. 120-21), then called the police (R. 120), and that Officer Swinfard arrived "ten minutes or so" after the call (R. 121). Thus, on appellee's own testimony, it was at least ten minutes before she made her statement to Officer Swinfard and possibly longer.

sion of the witness. Appellee does not contend, nor could it be contended, that such an opinion would have been admissible if offered by Mrs. Harrington at the trial. What appellee does say is that, for some reason which has not been explained, the rule prohibiting opinion evidence does not apply when the opinion forms part of an alleged spontaneous declaration. The authorities are to the contrary. See:

Anno., 163 A.L.R. 186:

"A general rule analogous to that which requires evidence of knowledge on the part of the speaker is that which forbids the use, to prove facts, of a res gestae utterance which expresses only a supposition, conclusion or opinion, as to those facts.

Boone v. Oakland Transit Co., 139 Cal. 490, 492-93, 73 Pac. 243, 244 (1903):

"There can be no question that the opinion of a witness who saw the accident, whether or not it was caused by the negligence of the defendant, would not be admissible, and would be injurious if allowed. With much more reason can it be said that hearsay statements as to the opinions of third persons, not placed upon the witness stand, and not subject to cross-examination, are both inadmissible and injurious, if directed to a material point in the case."

Catlin v. Union Oil Co., 31 Cal. App. 597, 610, 161 Pac. 29, 35 (1916):

"It may be assumed that the statements made by the deceased were sufficiently contemporaneous with the occurrence as to admit them in proof as part of the *res gestae* [Citation], but it does seem quite clear that the particular sentences objected to could not have been competent in any case; they were not statements expressive of how the accident occurred, for the witness had already described what had happened, but

presented purely the opinion and conclusion of the deceased as to the fluid which he was using being gasoline."

Appellee does not deny that the District Court relied heavily upon the foregoing inadmissible evidence in reaching its decision. Appellee does assert that the inadmissible evidence was "merely cumulative" of other evidence and that its admission was therefore only harmless error (pp. 20-21). On the contrary, without the inadmissible evidence it seems apparent that appellee could not have sustained her burden of showing that death did not result from suicide. Without that evidence the controlling facts would be these: the insured, angry at appellee, loaded the Mauser with ten rounds of ammunition, snapped the gun in an effort to get her attention, and when she continued to ignore him, put the gun to his head and pulled the trigger. Under such a state of facts, there would be no room for speculation as to what was intended. The inference of suicide would be inescapable.* See *Trivette v. New York Life Ins. Co.*, 283 F.2d 441 (C.A. 6, 1960), *cert. denied*, ... U.S. ..... (Oct. 9, 1961).

2. On the Basis of the Undisputed Evidence Appellant Is Entitled to Judgment as a Matter of Law.

The evidence is undisputed that on the evening of February 5, 1960, Arnold Harrington loaded the Mauser automatic pistol with ten rounds of ammunition, and, knowing

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**New York Life Ins. Co. v. Dick*, 359 U.S. 437, 79 S. Ct. 921 (1958) upon which appellee relies (p. 21) is not in point. In *Dick* there was no evidence as to how the gun was discharged. Here it is admitted that the insured put the gun to his head and pulled the trigger. In *Dick*, moreover, the burden under state law was upon the insurer to prove that death resulted from suicide. Under California law, which governs here, the burden is upon the beneficiary to establish that death did not result from suicide. See *Zuckerman v. Underwriters at Lloyd's*, 42 C.2d 460, 267 P.2d 777 (1954).

it to be loaded, put it to his head and pulled the trigger. In these circumstances, death was not accidental as a matter of law. The rule of the cases is this: when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental. The authorities to the point are cited and discussed on pages 20 through 24 of appellant's opening brief. Appellee has suggested a number of reasons why this rule of law should not be applied here. None of them are of substance.

Appellee says that the "voluntary" act of the insured in putting the gun to his head and pulling the trigger was not one from which death might foreseeably result, since the gun, had it been set on safe, could not have discharged (pp. 12-13). The answer, of course, is that the possibility that the safety might become dislodged or might not function was a risk any reasonable man would have foreseen. This was the risk the insured assumed when, after tampering with the hammer and safety, he voluntarily pointed the loaded gun to his head and pulled the trigger. It was the precise risk which resulted in his death.

Appellee deplores the "tortured reasoning" through which the courts have distinguished between policies insuring against accidental death and those insuring against death by accidental means, and then suggests that that distinction should be applied here to lessen appellee's burden of proof (pp. 22-23). The decisions, however, make no distinction between the two types of policies where, as here, the insured voluntarily embarks upon a hazardous course of conduct. In such a case, the risk which results in death is the risk which is apparent in the means producing death, and death, therefore, can be neither accidental nor produced by accidental means. See *Postler v. Travelers Ins. Co.*, 173 Cal. 1, 4, 158 Pac. 1022, 1023-24 (1916), *over-*

ruled on other grounds in Zuckerman v. Underwriters at Lloyd's 42 C.2d 460, 474, 267 P.2d 777, 785 (1954):

> "[A]n effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it . . . ."

See also *Price v. Occidental Life Ins. Co.,* 169 Cal. 800, 147 Pac. 1175 (1915), *Thompson v. Prudential Ins. Co. of America,* 84 Ga. App. 214, 66 S.E. 2d 119 (Ga. App. 1951) and *Ford v. Standard Life Ins. Co.,* 12 CCH Life, Health and Accident Cases 789 (Tenn. App. 1947).

Appellee's principal argument is that this case does not fall within the rule of *Postler* and *Price* because of an alleged finding by the District Court that death did not follow as a foreseeable consequence of the conduct of the insured (pp. 12-13). Upon a fair reading of the record, however, it is most doubtful that any such finding was either made or intended. Certainly there is no evidence of such a finding in that part of the opinion where the court expressly sets forth its findings of fact (R. 19). Appellee quotes a portion of the court's opinion in support of her position (p. 13), but an examination of the entire opinion demonstrates that the portion quoted was not intended as a finding of fact, but rather as part of a legal discussion in which the court vacillated between the standards of the foreseeable and the foreseen (see, in particular, R. 30-32). This conclusion is strongly supported by what was said by the District Court during argument and after the close of the evidence: "He [the insured] either knew or should have known that he was doing a dangerous thing." (R. 281). It cannot be assumed, in the absence of an express and

unequivocal finding, that the trial judge changed his views upon this question of fact after argument and prior to writing the opinion. Moreover, a finding that the insured could not reasonably have foreseen the mortal hazard he was creating could not, even if made, be sustained here; for it is clear as a matter of law that that hazard would have been obvious to anyone.

3. The District Court Erred in Applying the Substantive Law Relating to the Question of Accidental Death.

In reaching its decision the District Court failed to follow controlling decisions of the Supreme Court of California in the *Postler* and *Price* cases and erred in determining the hazardousness of the conduct of the insured by the subjective state of mind of the insured, rather than by the standard of reasonable foreseeability, as is the rule of the cases.

Appellee suggests that some of the California cases may be read to support the application of a subjective standard (p. 23), but the cases which are cited afford no such support. *Davilla v. Liberty Life Ins. Co.,* 114 Cal. App. 308, 299 Pac. 831 (1931) is in fact authority to the contrary, for the court said there:

> "So in the instant case, it cannot be said as a matter of law that the insured intended, by swerving and applying his brakes, to skid his motorcycle and to be thrown therefrom, *nor that he should have foreseen or anticipated the results of his voluntary attempts to avoid the peril.* (114 Cal. App. at 316, 299 Pac. at 834) (Emphasis added.)

None of the remaining cases cited involved situations where a reasonable man in the position of the insured would have apprehended any mortal danger whatever. In none of them,

therefore, was there any occasion to determine whether such a danger should be viewed subjectively or objectively. But in the California cases in which the point was involved in the decision, the rule has been that the hazardousness of the conduct of the insured was to be judged by the objective standard of reasonable foreseeability. See the cases cited and discussed on page 29 of appellant's opening brief.

Alternatively, appellee argues that the District Court in fact applied the objective standard of foreseeability in determining the danger involved in Mr. Harrington's conduct (p. 13). This contention appears to be based primarily upon the assumption that the court found as a fact that death was not the foreseeable consequence of the conduct of the insured. It seems highly doubtful, however, that any such finding was made (see *supra,* pp. 8-9). Moreover, a fair reading of the District Court's opinion demonstrates that the court in fact decided the case upon the basis of the subjective state of mind of Mr. Harrington. In that portion of the court's opinion in which the findings of fact are expressly set forth, the court found that the fact that the safety was in the fire position at the time of firing was a condition unknown to and unexpected by the insured (R. 19), but there is no parallel finding that this was a condition which could not reasonably have been foreseen by the insured. If the court were indeed applying an objective standard, why does no such finding appear? Moreover, the court found that the insured thought that the gun could be safely pointed at his head in a loaded condition (R. 19), a finding which also seems concerned solely with a subjective standard. Appellee suggests that the latter finding was necessary to determine the issue of suicide (p. 12) but this can hardly be so in view of the express finding that "the deceased had no intention to take his own life." (R.

19). It therefore seems apparent that the court in fact applied the erroneous subjective standard of the state of mind of the insured.

But even if it could be assumed that the rule of law applied by the District Court was not made clear by the opinion, appellee could not benefit by that lack of clarity. For the parties and this Court are both entitled to findings so explicit that they fairly demonstrate the basis upon which the case was decided. This Court has so held on numerous occasions. See, *e.g., National Lead Co. v. Western Lead Products Co.,* 291 F.2d 447, 451 (C.A. 9, 1961):

> "It is the duty of the district court to find the facts. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. 'The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached that decision.'"

Where the trial court has applied an improper rule of law, see *Lindbar, Inc. v. St. Louis Fuel & Supply Co.,* 276 F.2d 882 (C.A. 6, 1960) or has not made clear the basis of its decision, see *National Lead Co. v. Western Lead Products Co.,* 291 F.2d 447 (C.A. 9, 1961), it is normally appropriate that the judgment be reversed and the case remanded. But that course need not be followed here, for it is clear as a matter of law that death followed as a foreseeable consequence of the conduct of the insured. The evidence is undisputed that after tampering with the hammer and safety mechanism of a fully loaded gun, the insured deliberately and voluntarily pointed the gun to his head and pulled the trigger. The hazard involved in this extraordinary course of conduct was clearly foreseeable. In the words of the District Court, "[h]e either knew or should have known that he was doing a dangerous thing." (R. 281).

CONCLUSION

For the reasons here summarized and discussed more fully in appellant's opening brief, the judgment should be reversed and the case remanded with directions that judgment be entered for appellant.

Dated: November 17, 1961.

Respectfully submitted,

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